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No. 857

THE SUPREME COURT

OF THE UNITED STATES

OTTO BURGDORF,

Petitioner,

vs.

STATE OF CALIFORNIA
ALAN CRANSTON, CONTROLLER
OF THE STATE OF CALIFORNIA,
DOES ONE THRU TWENTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

OTTO BURGDORF
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Woodland, California

In Prop.
Persona,
Petitioner

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THE SUPREME COURT

OF THE UNITED STATES

OTTO BURGDORF,	)
	)
Petitioner,	)
	)
vs.	)
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STATE OF CALIFORNIA,	)
ALAN CRANSTON, CONTROLLER	)
OF THE STATE OF CALIFORNIA,	)
DOES ONE THRU TWENTY,	)
	)
Respondents.	)
	)

PETITION FOR WRIT OF CERTIORARI

This petition is entered pursuant to United States Code, Title 28, Sections 1654 and 2101 and Rule 19(b) of the Revised Rules of the Supreme Court of the United States.

The grounds upon which the jurisdiction of the United States Supreme Court is based are the 5th and 14th Amendments of the United States Constition which are violated by a decision of the Superior Court in and for the County of Sacramento, State of California.

This said decision was affirmed by the Third Appellate District Court of the State of California. A petition for a hearing of this case directed to the California Supreme Court was denied by this latter court.

The order denying this petition for hearing was filed on September 29, 1965.

Jurisdiction of the United States Supreme Court to review the judgment in question by a writ of certiorari is based on 28 USC, Section 1257.

The refusal of the State of California to return money collected by this state thru motor fuel distributors from petitioner forms the basis for this legal action.

The facts surrounding this case are related in some detail in appellant's opening brief beginning at the bottom of page 4.

The legal grounds on which this action was brought was violation of:

1. The "due process of law clause" of the 14th Amendment of the United States

Constitution.

2. The "just compensation clause" of the 5th Amendment of the said constitution, besides the legal grounds contained in the California Constitution.

The Sacramento Superior Court sustained a demurrer interposed by the Attorney General based on Section 8148 of the California Revenue and Taxation Code. The test of this section is found on the bottom of page 3 of appellant's opening brief to the Third District Appellate Court of the State of California.

The record of these proceedings can be found in the accompanying Clerk's Transcript.

Petitioner appealed to the District Court of Appeal on the ground that the provisions of the United States Constitution control and that the statute of limitation was being misused.

Said District Court of Appeal affirmed the decision of the Sacramento Superior Court on the basis of the interposed demurrer

and gave no reasons for ignoring the applicability of the above-mentioned clauses of the United States Constitution. It held the period of 90 days in which legal action can be brought in this case to be constitutional.

Petitioner's contention with regard to the purpose and scope of the Statute of Limitations are well outlined on page 13 of his Opening Brief, above referred to, beginning on line 5 to which reference is being made.

While petitioner requests a decision with regard to the unconstitutionality of the actions and proceedings of the gas tax refund division relating to the applicable provisions of the United States Constitution, the primary reason for petitioning the United States Supreme Court for a review of this case is a request for a determination by this court of a proper basis for setting time limits. In other words, should the shortest possible time be the basis for fixing the period of time in which to act or should the time limit be a protection against

"stale claims."

The matter embraced in this question is substancial and of import for every state in the Union.

Wherefore petitioner prays that this petition for a writ of certiroari be granted.

Respectfully submitted,

OTTO BURGDORF

PROOF OF SERVICE

I,_____

Deputy Attorney General, of the State of California hereby acknowledges receipt of a copy of the foregoing petition for a writ of certiorari to the Supreme Court of the United States, this_____day of_____, 196__

_____

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DOES ONE THRU TWENTY,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI JUDGMENT OF APPELLATE COURT

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	)

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
JUDGMENT OF APPELLATE COURT

A general demurrer to an amended complaint of appellant for a gasoline tax refund was sustained without leave to amend. It was sustained upon the ground that the complaint showed upon its face that the action was barred by special statutes of limitations. (Rev. & Tax. Code, Secs. 8148 and 8149.5.) The first of these sections provides than an action for a gasoline tax refund may be brought within 90 days

after the mailing of a notice of action upon the taxpayer's application for the refund. The latter section provides that a failure by the taxpayer to bring the action within the time limited constitutes a waiver of the claim.

On appeal plaintiff, appearing in propria persona, argues earnestly the merits of his application for the refund. It is beyond the jurisdiction of this court to hear that plea. The sole question before us is whether the action is barred by the statutes cited. We hold that it is.

Statutes of limitation, which are statutes of repose, are vital to the welfare of society and are within the jurisdictional power of the Legislature. (Scheas v. Robertson (1951) 38 Cal. 2d 119, 125.) It is not a judicial prerogative to nullify acts of the Legislature fixing periods of limitation on causes of action. (Fontana Land Co. v. Laughlin (1926) 199 Cal. 625, 636.) Of course, to withstand the challenge of a charge of unconstitutionality, the period allowed by statute must be reasonable. (Scheas v. Robertson, supra, at

p. 125; Wilson v. Iseminger, 185 U. S. 55 (46 L. Ed. 804); Vance v. Vance, 108 U. S. 514 (27 L. Ed. 808).)

A 90-day statute of limitations has been upheld. (Goncalves v. San Francisco Unified School Dist., 166 Cal. App. 2d 87; Young v. County of Ventura, 39 Cal. App. 2d 732.) In Winters v. State Board of Equal. (1949) 93 Cal. App. 2d 87, this court held that a 60-day statute of limitations upon an action for refund of motor vehicle transportation license tax was not unconstitutional under article XIII, section 15, of the California Constitution. (See also Pac. Gas etc. Co. v. State Board of Equal. (1955) 134 Cal. App. 2d 149.) We cannot hold that a 90-day period of limitations is unreasonable under the circumstances here.

Appellant refers to the general statutes of limitation in the Code of Civil Procedure and particularly to section 348 of that Code. But a general statute has no applicability when a later special statute covering the subject

matter explicitly has been enacted. (Ainsworth v. Bryant, 34 Cal. 2d 465, 471-472.)

The cases cited by appellant do not cover the only issue which is before this court and are not in point.

The judgment is affirmed.

Pierce, P. J.

We concur:

Friedman, J.

Regan, J.

CERTIFICATION OF NONPUBLICATION

This opinion does not require publication in the advance sheets or official reports under the standards provided by rule 976, California Rules of Court.

Pierce, P. J.

Friedman, J.

Regan, J.